

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

)
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Processing Order for Applications

) FCC 99-240

Filed Pursuant to the Commission's

New Local Broadcast Ownership Rules

)
Review of the Commission's Regulations

) MM Docket No. 91-221

Governing Television Broadcasting

)
Television Satellite Stations

) MM Docket No. 87-8

Review of Policy and Rules

**COMMENTS OF
OFFICE OF COMMUNICATION INC. OF THE UNITED CHURCH OF CHRIST
BLACK CITIZENS FOR A FAIR MEDIA
CENTER FOR MEDIA EDUCATION
WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWER'S
CONSTITUTIONAL RIGHTS**

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Sara Steetle
Law Student
Georgetown University Law Center

Angela Campbell, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., Suite 312
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman, Esq.
Cheryl A. Leanza, Esq.
Media Access Project
1707 L Street, NW St. 400
Washington, D.C. 20036
(202) 232 - 4300

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Counsel for UCC, *et al.*

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The Office of Communication Inc. of the United Church of Christ ("UCC"), Black Citizens for a Fair Media, Center for Media Education, and Washington Areas Citizens Coalition Interested in Viewer's Constitutional Rights respectfully submit these comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules*, Public Notice, FCC 99-240 (rel. Sept. 9, 1999) ("Public Notice"). Commenters are public interest organizations representing the interest of broadcast listeners and viewers throughout the country.

UCC, *et al.* oppose the use of random selection to determine the processing order of transfer applications in this case. The Commission has no authority use a lottery, and even if it did, it is not in the public interest to leave such an important decision to pure chance. In this

case, the means by which the Commission processes the applications necessarily determines which transfer application will be granted. We suggest that the Commission use a point system for determining the order for processing applications because a point system will protect the rights of the applicants, while best serving the interest of the public.

I. THE COMMISSION HAS NO AUTHORITY TO PROCESS LICENSE TRANSFER APPLICATIONS USING A SYSTEM OF RANDOM SELECTION.

The Commission has neither an explicit nor an implicit grant of authority to hold lotteries to determine the processing order of applications for license transfers. Moreover, the use of a lottery in this case would be impractical and would lead to inequitable results.

A. The Commission has no legal authority to use lotteries to dispose of applications for the transfer of broadcast licenses.

The FCC's sole statutory authority to conduct lotteries is section 309(i) of the Communications Act. *See* 47 U.S.C. §309(i). *See also Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 (D.C. Cir. 1988) (holding that the terms of section 309(i) govern any system of random selection adopted by the Commission to distribute broadcast licenses). The plain language of section 309(i) grants authority to the FCC to hold a lottery only to dispose of *initial* applications for licenses.¹ The instant case deals with the *transfer* of broadcast licenses. Thus, the FCC has no authority to hold lotteries to dispose of transfer applications in this case.

¹ The language of the statute is clear: "If there is more than one application for any *initial* license or construction permit, then the Commission shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection." *See* 47 U.S.C. §309(i)(1) (emphasis added).

Even if section 309(i) could somehow be read to apply to transfer applications, Congress revoked any power the FCC had to use a lottery to award commercial broadcast licenses. *See* 47 U.S.C. §309(i)(5)(A). Section 309(i)(5)(A) removes from the FCC all power to hold a lottery, except in the noncommercial broadcast context.² Unless there is a clear intention otherwise, a more specific statute will be given precedence over a more general one. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 443 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Busic v. United States*, 446 U.S. 398, 406 (1980)). Section 309(i)(5)(A)'s explicit statutory revocation therefore overrules any inherent authority the Commission may believe it has to hold lotteries to dispose of transfer applications. Thus, the FCC has no authority to use lotteries in this case.

B. The FCC's claim of authority to use lotteries to determine the processing order of applications is not supported by even the most liberal reading of section 310(d).

The Commission cites section 310(d) as its source of authority to use a system of random selection to determine which transfer application will be processed first. *See Public Notice*. However, nothing in the text of section 310(d) explicitly or implicitly grants the Commission the power to use lotteries to determine the order of processing. Even if section 310(d) could be read to implicitly authorize the FCC to use a lottery in processing transfer applications, any implicit authority has been limited by section 309(i)(5)(A)'s revocation of the lottery power.

² Section 309(i)(5)(A) states in pertinent part: "the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997." *See* 47 U.S.C. §309(i)(5)(A).

In the Public Notice, the Commission claims that section 309(i)(5)(A) does not revoke its power to hold a lottery in the transfer context because by its terms it applies only to the use of a lottery to issue an *initial* license. However, because section 309(i)'s lottery authority only applies to initial licensing and does not include transfer applications, the Commission lacks the authority to use a lottery to dispose of transfer applications in the first place. And even if the Commission were to assert that section 309(i) includes transfer applications, then the revocation of that power by Congress must apply to transfers as well.

C. Using a lottery to determine the order of processing is inequitable and impractical.

Even if the FCC had authority to use a lottery, it would not be in the public interest to use one in the present case.³ First, using a lottery is unlikely to promote the important public interest goal of ownership diversity. When employing a lottery, section 309(i)(3)(A) of the Communications Act requires the Commission to grant significant preferences to: 1) applicants who would further diversify the ownership of the local media, or 2) applicants who would be minority owners. *See* 47 U.S.C. § 309(i)(3)(A). In this case, however, neither preference will be applicable. The preference for diversity of ownership will never apply in the present case because by definition the transferee already owns a broadcast station within the local Designated Market Area (DMA). The preference for minority ownership will most likely not apply, because given

³ For example, a lottery system is not as efficient as the Commission may believe. A lottery may save time and money, but any gains in this respect will be lost when the losing applicants appeal. Moreover, a lottery is a form of random selection and by definition cannot ensure that the applicant who would best serve the public interest is chosen.

the paucity of minority owned broadcasting stations, the large majority of transfer applications will not involve a transfer of a license to a minority owner.

Second, the Commission's reasons for using lotteries under section 309(i) in the past are noticeably absent from the instant case. The Commission justified its decision to distribute cellular phone licenses via a lottery by noting that the owners of those licenses have no editorial control over the messages relayed by the use of the licenses. *Cf. Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, Second Report and Order, 93 FCC2d 952 (1983), at ¶ 13. This controlling factor is not present in the instant case because broadcasters retain editorial control. The Commission justified its decision to use a lottery to distribute low power television licenses by asserting that it was the only realistic way to deal with the vast number of applications received. *See Pappas v. FCC*, 807 F.2d 1019 (D.C. Cir. 1986). However, in the present case, the number of applications for transfers of broadcast licenses is completely unpredictable and therefore cannot be used as a justification for implementing a lottery.

In sum, the Commission has no authority to use a lottery to process transfer applications in this case. In fact, Congress specifically revoked any authority to use any system of random selection to dispose of broadcast licenses. And even if the Commission did have the authority, there is little, if any, public policy rationale to support the use of a lottery in this case.⁴

⁴ Because a lottery is patently unlawful and because of the unseemly speed with which the Commission is proceeding, UCC, *et al.* wish to make clear our intention to seek a stay from the Commission and if necessary from a court to stop any implementation of such a proposal.

II. THE COMMISSION SHOULD USE A POINT SYSTEM TO DETERMINE THE ORDER FOR PROCESSING TRANSFER APPLICATIONS.

We suggest that the Commission use a point system to determine the processing order for mutually exclusive transfer applications. A point system will satisfy the Commission's obligation to serve the public interest by processing the applications efficiently and selecting the transferee that will best serve the needs of the public. A point system will also adequately protect the rights of the applicants.

A. The Commission has the authority to use a point system in this case.

The Commission has the power to use a point system to determine which transfer application should be granted.⁵ The Commission has implemented a point system to allocate Instructional Television Fixed Service (ITFS) licenses. *See ITFS Processing Issues*, 11 FCC Rcd 12,380 (1996). The Commission has contemplated exercising this authority in the noncommercial educational broadcasting context. *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 98-269, Further Notice of Proposed Rulemaking (rel. Oct. 21, 1998). Nor are there any statutory impediments to exercising this authority in the instant case. Section 310(d) does not prevent the Commission from using a point system. By its terms, section 310(d) only proscribes comparing two or more applicants for the transfer of *the same license*. *See* 47 U.S.C. §310(d). This case deals with separate transfers of separate licenses to consolidate duopolies within the same DMA, a situation not covered by the statute.

⁵ A point system is essentially a type of a paper hearing. The Commission has the statutory authority to use paper hearings to process broadcast license applications. *See Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985). *See also* 5 U.S.C. §556(d).

In fact, a point system may be the only lawful and practical means by which the Commission can dispose of the transfer applications. Since this case deals with mutually exclusive applications, the applicants have a right to some form of a hearing. See *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327, 330 (1945). In the instant matter, the system the Commission adopts to determine the order in which the Commission processes the applications will necessarily determine whose transfer application will be granted. As the Commission indicated in its Public Notice, not all transfer applications filed on the same day will be able to be granted because of the new voice count system under the broadcast ownership rules. "If a grant of any one of these applications would bring the voice count down to eight in the DMA ... then neither of the remaining applications could be granted." *Public Notice*. The Commission explicitly recognized that "the order in which the applications are processed would thus be determinative in these situations." *Id.*

Under *Ashbacker* and its progeny, the Commission must craft a legal method of processing these applications that will not violate the rights of the applicants. As elaborated above in Part I.A., the Commission cannot use a lottery. Nor does the Commission have any authority to use an auction in this case. The Commission has preliminarily concluded in the Public Notice that processing the applications on a first-come, first served basis is inherently difficult. Such a system is also irrational and arbitrary. Finally, time constraints indicate that the Commission is not inclined to use a full-blown comparative hearing process. Therefore, a point system is the only realistic option available to the Commission to process transfer applications in present case.

B. The FCC should structure a point system that will maximize the efficiencies of joint ownership and preserve the diversity of voices in local areas.

The Commission should adopt a point system that maximizes the efficiencies of joint ownership and helps preserve the diversity of voices in local markets. In designing such a point system, the Commission should use criteria that are quantifiable and enforceable. We suggest certain elements the Commission may use to assign points.

Specifically, the Commission should assign points for using efficiencies inherent in joint ownership to enhance local programming. Possibilities include: 1) adding a point for an increased quantity of new regularly scheduled, locally originated local news or public affairs programs, 2) adding a point for airing new "core" educational children's programming beyond that currently scheduled, 3) subtracting a point for a specific quantity of home shopping, infomercials, or other programs primarily devoted to the sale or promotion of goods and services, 4) subtracting a point for past violations of children's programming commercial guidelines, and 5) subtracting a point for loss of diversity where the applicant directly or indirectly provides locally originated news programming to other broadcast stations within the DMA. Where applicants promise to implement new, additional programming, they should be required to certify continuing compliance and intention to remain in compliance in subsequent license renewal applications.

The Commission should also assign points for implementing pro-diversity initiatives. We suggest adding points for applicants with a substantive involvement in an incubator program for a small or disadvantaged business, and adding a point for substantive contributions to any communications-oriented small or disadvantaged business fund. We also recommend adding

points for a transfer that is part of a larger transaction that includes one or more spinoffs of a station to a small or disadvantaged business.

The Commission should assign points for local community involvement. We suggest: 1) the addition of a point for substantial participation in any mass media high school or college educational scholarships or internship programs for disadvantaged youths, and 2) the addition of a point if the transferee is an active resident of the local community. The Commission should also assign points for adoption of anti-discrimination policies. We suggest adding a point for an exemplary EEO record or subtracting a point for past violations.

In some cases, use of a point system may lead to ties between applicants. The Commission cannot resort to lotteries to resolve these impasses, however. *See supra* at Parts I.A & I.B. For these cases, we suggest that the Commission use a paper hearing as a tiebreaker.⁶ Paper hearings will not be overly cumbersome or time consuming in this case because they will only be used when there are a few remaining applicants whose point totals are equal. The point system will eliminate most contenders from the pool in a way that quantitatively takes into account the public interest benefits each has to offer. Only the few stations with the same number of points will then be examined via a paper hearing. This joint system will ensure that the best applicants for the transfer will receive the Commission's approval.

⁶ The Commission may delegate authority to hold such hearings to an individual Commissioner or to an administrative law judge. *See* 47 U.S.C. §155(c)(1). The purpose of the hearing would be to assess the benefits each applicant has to offer, weighting those benefits to determine which applicant would better serve the public interest if awarded the transfer.

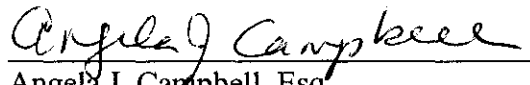
Conclusion

The Commission has no authority to use lotteries to determine the order of process of mutually exclusive transfer applications, and moreover, lotteries do not guarantee that the most qualified applicants obtain approval. The Commission should determine the order for processing mutually exclusive broadcast license transfers by a point system to ensure that the most qualified applicants are selected. A point system with a paper hearing as a tiebreaker is the most efficient way to take into account the qualitative benefits stations in a transfer have to offer the community.

Respectfully submitted,

Of Counsel:
Fernando Bohorquez
Graduate Fellow
Georgetown University Law Center

Sara Steetle
Law Student
Georgetown University Law Center


Angela J. Campbell, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., Suite 312
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman, Esq.
Cheryl A. Leanza, Esq.
Media Access Project
1707 L Street, NW St. 400
Washington, D.C. 20036
(202) 232 - 4300

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